



FEDERAL ELECTION COMMISSION
Washington, DC 20463

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CERTIFIED MAIL
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ADVISORY OPINION 2005-16

Marc E. Elias, Esq.
Brian G. Svoboda, Esq.
Perkins Coie LLP
607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

Dear Messrs. Elias and Svoboda:

We are responding to your advisory opinion request on behalf of Fired Up! LLC ("Fired Up"), concerning the application of the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations to certain Internet websites owned and operated by Fired Up.

The Commission concludes that the costs Fired Up incurs in covering or carrying news stories, commentary, or editorials on its websites are encompassed by the press exception, and therefore do not constitute "expenditures" or "contributions" under the Act and Commission regulations.

Background

The facts presented in this advisory opinion are based on your letters received August 22, 2005, and September 13, 2005, and publicly available documents. Fired Up is a for-profit limited liability company ("LLC") that was formed under the laws of the State of Missouri in March 2005. In documents filed with the Missouri Department of Revenue and the Internal Revenue Service, Fired Up has classified itself as a partnership, although it has not formally elected to be classified as a partnership under Federal tax law.

In its Articles of Organization, Fired Up states that its purpose is "[t]o publish a website and any other lawful purpose." Articles of Organization (March 4, 2005). Fired

Up hopes to establish and maintain a network of up to 15 State-specific websites in the coming year, depending on available funding. Currently, Fired Up maintains three State-specific websites (for Missouri, Maryland and Washington), and one website aimed at national issues.¹ Access to Fired Up's websites is free and available to the public without registration or subscription. Neither Fired Up nor any of its websites is owned or controlled by any political party, political committee or candidate.

Fired Up's Missouri website states that Fired Up's mission "is to keep Missourians informed and united in the fight for responsible government, strong communities, and secure families." See "What is the Mission of Fired Up?" <<http://www.firedupmissouri.com/whoweare>>. A founding member of Fired Up, former U.S. Senator Jean Carnahan, urges readers of the Missouri website to "[t]hink of Fired Up! as you would a local coffee shop--a place where we can exchange ideas, freely and respectfully. But," she adds, "it is also a launching pad for community action that grows out of our discussions and concerns." See "A Message From Jean Carnahan," <<http://www.firedupmissouri.com/jean>>.

Fired Up was founded by three individuals: Ms. Carnahan, Roy Temple, and Scott Sorrell. According to biographical information on Fired Up's Missouri website, Mr. Temple has served as the executive director of the Missouri Democratic Party and as chief of staff both to Ms. Carnahan and to her late husband, former Governor Mel Carnahan.² Mr. Sorrell is a computer consultant and designer of POWERbase campaign software.³

Fired Up does not have any employees, nor does it have an editorial board or staff. It generates revenue through the sale of buttons, bumper stickers, and T-shirts. Its only operating expenses are payments to Mr. Sorrell's firm for technological support. You have not identified any expenses incurred by Fired Up in connection with the content of its websites. Fired Up has yet to adopt an operating agreement to apportion costs and revenues among its members, although you state that it expects in the future to hire employees, incur additional operating expenses, and generate revenue through the sale of advertising on its websites. Fired Up might also solicit funding from "various benefactors and investors."

Mr. Temple provides most of the content on Fired Up's websites. This content, which you describe as "unabashedly progressive," generally consists of commentary on, quotes from, and summaries of, news articles appearing on other entities' websites, with hyperlinks to the quoted and summarized articles. Fired Up does not have any written agreements with these other entities regarding Fired Up's posting of quotes from, and hyperlinks to, their websites.

¹ See <<http://www.firedupmissouri.com>>, <<http://www.firedupmaryland.com>>, <<http://www.firedupwashington.com>>, and <<http://www.firedupamerica.com>>.

² See <<http://www.firedupmissouri.com/bio-roy>>.

³ See <<http://www.firedupmissouri.com/whoweare>>.

You state that Fired Up conducts some “original news reporting.” As examples, you refer to two postings on Fired Up’s Missouri website concerning House Majority Leader Roy Blunt.⁴ Each of these postings includes a headline and an indication that it was submitted by Mr. Temple. The postings are also specifically designated as “FiredUpMissouri.com Exclusive[s].” In this respect, they differ from the other postings on Fired Up’s websites, which typically only include user-created headlines and a reference to the individuals who posted them. Consistent with this latter approach, Fired Up’s websites expressly provide that “the posts and comments [appearing on the websites] are the views of the authors,” rather than of Fired Up. *See, e.g.*, <<http://www.firedupamerica.com>>.

You indicate that Mr. Temple exercises final editorial and formatting control over the content of Fired Up’s websites, and that he might edit content posted by registered users, delete it, move it, or leave it alone. Although Mr. Temple is not compensated for his services, Fired Up anticipates paying him as an employee once it generates sufficient revenue.

In addition, you state that “other media outlets” have referred to postings on Fired Up’s websites. As an example, you cite a reference to a posting on Fired Up’s national website that appeared in *The Blogometer*,⁵ the *National Journal*’s “daily report . . . taking the temperature of the political blogosphere.”⁶ You also refer to an article in *The St. Louis Post Dispatch* that reported on a story “first disclosed on the FiredUpMissouri.com Web site of Democratic activist Roy Temple.”⁷

Any reader of a Fired Up website can post his or her own content directly onto the website after using a free sign-in feature to become a “registered user” of the website. Each registered user also receives a complimentary weblog on the website, and can post comments directly on other registered users’ weblogs and in response to content on the main page of the website. The placement of all posts within the “popular content” section of the main page of each website is determined, in part, by the popularity of each post, based on the number of “hits” received from readers.

In addition to commenting on and summarizing articles appearing on other entities’ websites and displaying content posted by registered users, the Fired Up Missouri website features “guest editorials” by Ms. Carnahan and other individuals. Each Fired Up website also contains calls to action, such as a posting by Mr. Temple that urged readers to contact Wal-Mart’s chief executive officer in opposition to Wal-Mart’s decision to sue an employee.⁸ Finally, each Fired Up website provides hyperlinked lists of content on other Fired Up websites, weblogs featured on a “community blogroll,” and,

⁴ *See* “DeLay gave Roy Blunt \$150,000,” <<http://www.firedupmissouri.com/delayblunt>>, and “Former Blunt Aide Paid \$50,000 for Veto Insurance Effort,” <<http://www.firedupmissouri.com/vetoinurance>>.

⁵ *See* “Miscellany: This Would Be News, But, You Know . . .,” <http://blogometer.nationaljournal.com/archives/2005/09/99_katrina_katr.html>.

⁶ <<http://blogometer.nationaljournal.com/>>.

⁷ *See* “Realtors’ Lobbyist Has Close Ties To Governor’s Father,” *St. Louis Post-Dispatch*, July 12, 2005, p. A1.

⁸ *See* “Wal Mart’s Shameful Lawsuit,” <<http://www.firedupamerica.com/shankwalmart>>.

separate from its own headlines, a list of headlines from (and hyperlinks to) websites maintained by CNN and *The Washington Post*.⁹

Question Presented

Is Fired Up eligible for the press exception?

Legal Analysis and Conclusion

The Commission concludes that, in light of the facts presented, Fired Up's disbursements for news stories, commentary, and editorials on its websites are encompassed by the press exception, and therefore do not constitute "expenditures" or "contributions" under the Act and Commission regulations.

Press Exception

The Act and Commission regulations define the terms "contribution" and "expenditure" to include any gift of money or "anything of value" for the purpose of influencing a Federal election. *See* 2 U.S.C. 431(8)(A) and (9)(A); 11 CFR 100.52(a) and 100.111(a). However, there is an exception for "any cost incurred in covering or carrying a news story, commentary, or editorial by any broadcasting station (including a cable television operator, programmer or producer), newspaper, magazine, or other periodical publication . . . unless the facility is owned or controlled by any political party, political committee, or candidate[.]" 11 CFR 100.73, 100.132; *see also* 2 U.S.C. 431(9)(B)(i). This exclusion is known as the "press exception."

The Commission has applied a two-step analysis to determine whether the press exception applies. First, the Commission asks whether the entity engaging in the activity is a press entity as described by the Act and Commission regulations. *See, e.g.,* Advisory Opinions 2004-07, 2003-34, 2000-13, 1998-17, 1996-48, 1996-41, and 1996-16. Second, in determining the scope of the exception, the Commission considers: (1) whether the press entity is owned or controlled by a political party, political committee, or candidate; and (2) whether the press entity is acting as a press entity in conducting the activity at issue (*i.e.*, whether the entity is acting in its "legitimate press function"). *See Reader's Digest Association v. FEC*, 509 F. Supp. 1210, 1215 (S.D.N.Y. 1981); *FEC v. Phillips Publishing*, 517 F. Supp. 1308, 1312-1313 (D.D.C. 1981); Advisory Opinions 2004-07, 2000-13, 1996-48, and 1982-44. Two considerations in applying this analysis include whether the entity's materials are available to the general public and are comparable in form to those ordinarily issued by the entity. *See Federal Election Commission v. Massachusetts Citizens for Life*, 479 U.S. 238, 251 (1986); Advisory Opinion 2000-13 (concluding that a website covered by the press exception was "viewable by the general public and akin to a periodical or news program distributed to the general public.")

⁹ Fired Up does not have any written agreements with either CNN or *The Washington Post* regarding these hyperlinks.

1. Press Entity Status

Fired Up qualifies as a press entity. Its websites are both available to the general public and are the online equivalent of a newspaper, magazine, or other periodical publication as described in the Act and Commission regulations.

An examination of Fired Up's websites reveals that a primary function of the websites is to provide news and information to readers through Fired Up's commentary on, quotes from, summaries of, and hyperlinks to news articles appearing on other entities' websites and through Fired Up's original reporting. Fired Up retains editorial control over the content displayed on its websites, much as newspaper or magazine editors determine which news stories, commentaries, and editorials appear in their own publications. Roy Temple, acting on behalf of Fired Up, not only produces much of the content but also exercises day-to-day control over which stories are featured. Reader comments appearing on Fired Up's websites are similar to letters to the editor and do not alter the basic function of Fired Up. *See* Advisory Opinion 1996-16 (the "use of audiences composed of non-reporters, and subscribers and guests at computer terminals, does not alter the basic nature" of Bloomberg LLP's electronic town meeting featuring presidential candidates with a moderator, a set format, and a time limit.)

According to the House report on the 1974 amendments to the Act, the press exception made plain Congress's intent that the Act would not "limit or burden in any way the first amendment freedoms of the press ..." and would assure "the unfettered right of the newspapers, TV networks, *and other media* to cover and comment on political campaigns." *H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. at 4* (1974) (emphasis added). Consistent with this intent, the Commission has already expressly extended the press exception to qualified activities that appear on the Internet. For instance, in Advisory Opinion 2000-13 the Commission found that iNEXTV, a company operating a network of specialized news and information websites with limited original content, qualified for the press exception through its Internet activities even though it lacked a traditional "offline" media presence. The Commission concluded that iNEXTV and its EXBTv website were press entities "both as to their purpose and function." Advisory Opinion 2000-13. The Commission characterized the network of news and information websites operated by iNEXTV as "webcast video periodicals." *Id.* In finding EXBTv to be a press entity, the Commission noted the "news function" that EXBTv provided through direct access to news and commentary. The Commission concluded that the website was "viewable by the general public and akin to a periodical or news program distributed to the general public." *Id.*¹⁰ The Commission reaches the same conclusion here with respect to the Fired Up websites described in your request. Thus, Fired Up is a press entity and satisfies the first step of the press exception test.

¹⁰ *See also* Advisory Opinion 2004-07 (MTV's website promotion of "Prelection" and contemporaneous posting of candidate materials on MTV website entitled to the press exception) and Advisory Opinion 2003-34 (depiction of Federal candidates on Viacom and Showtime websites entitled to the press exception).

2. Ownership Criteria and Legitimate Press Function

Fired Up is a for-profit LLC¹¹ and is not owned or controlled by any political party, political committee, or candidate. Given that Fired Up's operation of its websites is at the core of its activities as a press entity, its provision of news stories, commentary, and editorials on its websites falls within Fired Up's legitimate press function.¹² Thus, because Fired Up is a press entity, and neither it nor its websites are owned or controlled by any political party, political committee, or candidate, the costs Fired Up incurs in covering or carrying a news story, commentary, or editorial on its websites are exempt from the definitions of "contribution" and "expenditure." The Commission notes that an entity otherwise eligible for the press exception would not lose its eligibility merely because of a lack of objectivity in a news story, commentary, or editorial, even if the news story, commentary, or editorial expressly advocates the election or defeat of a clearly identified candidate for Federal office. *See* First General Counsel's Report, MUR 5440 (CBS Broadcasting, Inc.) ("Even seemingly biased stories or commentary by a press entity can fall within the media exemption.")

The Commission expresses no opinion regarding the application of State law or the Internal Revenue Code to the proposed activities because those questions are not within the Commission's jurisdiction.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity.

Sincerely,

(signed)

Scott E. Thomas
Chairman

Enclosures: Advisory Opinions 2004-07, 2003-34, 2000-13, 1998-17, 1996-48, 1996-41, 1996-16 and 1982-44.

¹¹ For-profit status is not essential to a determination that an entity qualifies for the press exception.

¹² You do not ask, and the Commission does not address, whether any other activities Fired Up may wish to conduct, whether on the Internet or not, would be within the scope of Fired Up's press function. *See, e.g.*, Advisory Opinion 2004-07 (MTV's provision of election-related educational materials at community events does not qualify as a press function because this activity is not one typically performed by a press entity).

CONCURRING OPINION

**CHAIRMAN SCOTT E. THOMAS
COMMISSIONER DANNY LEE MCDONALD**

ADVISORY OPINION 2005-16

In Advisory Opinion 2005-16, the Federal Election Commission found that a series of blogs created by Fired Up! LLC (“Fired Up”), a partnership established earlier this year, qualifies for the press exception found at 2 U.S.C. § 431(9)(B)(i). Given the facts before the Commission at this time, we voted to approve Advisory Opinion 2005-16. We did so, however, recognizing that only time will truly tell whether Fired Up is actually a media entity, or an entity controlled by a candidate or political party, or even a “political committee” under the Act.

The Act specifically excludes certain press activities from the definition of contribution and expenditure. Qualification for the so-called “press exception” is reserved for:

Any news story, commentary, or editorial distributed through the facilities of any broadcasting station, newspaper, magazine, or other periodical publication, unless such facilities are owned or controlled by any political party, political committee, or candidate.

2 U.S.C. § 431(9)(B)(i). The Supreme Court has stated that the press exception should be narrowly construed. In rejecting a press exception claim by an incorporated entity¹³ in *Federal Election Commission v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 251 (1986) (“*FEC v. MCFL*”)(emphasis added), the Court stated, “A contrary position would open the door for those corporations and unions with in-house publications to engage in unlimited spending directly from their treasuries to distribute campaign material to the general public, *thereby eviscerating § 441b’s prohibition.*”

¹³ The Act generally prohibits “any corporation whatever” from making any contribution or expenditure from corporate treasury funds in connection with a federal election and further prohibits any candidate or committee from knowingly accepting any such contribution. 2 U.S.C. § 441b(a).

We agree with the conclusion of Advisory Opinion 2005-16 that “Fired Up qualifies as a press entity.” Advisory Opinion 2005-16 at 5. Quoting from Fired Up’s Missouri website, the Opinion points out that:

Fired Up’s mission “is to keep Missourians informed and united in the fight for responsible government, strong communities, and secure families.” . . . A founding member of Fired Up, former U.S. Senator Jean Carnahan, urges readers of the Missouri website to “[t]hink of Fired Up! as you would a local coffee shop—a place where we can exchange ideas, freely and respectfully. But,” she adds, “it is also a launching pad for community action that grows out of our discussion and concerns.”

Advisory Opinion 2005-16 at 2 (citations omitted). Based upon these and other materials we have seen on the website as well as the representation that Fired Up is going to have as its sole business the distribution of news stories, editorials and commentaries, we believe that, on balance, Fired Up qualifies as a press entity.

Even though we voted to approve Advisory Opinion 2005-16, this request does present several concerns. First, under the statute, the press exception is not available if an entity is “owned or controlled” by a political party or a candidate. 2 U.S.C. § 431(9)(B)(i). For example, the Missouri Democratic Party cannot directly or indirectly set up a website, print “news” about Republican Party House and Senate candidates, and then finance the whole effort with unlimited contributions from individuals or prohibited corporate and labor money because it claims the website is entitled to the press exception.

The facts of this matter reveal a number of strong connections—historical and financial—between Fired Up and the Missouri Democratic Party and Democratic federal candidates in the state. According to Fired Up’s website, Roy Temple (a co-founder of Fired Up and the primary editor of the website’s content) was Executive Director of the Missouri Democratic Party during the 2000 election cycle and worked as an advisor to the state party in the 2004 election cycle. *See also St. Louis Post Dispatch* (October 9, 2005)(Fired Up is “one of a cadre of blog sites set up in March by veteran Democratic consultant Roy Temple, *with the support of many of the state party’s top figures.*”) (emphasis added). The second co-founder is Scott Sorrell, owner/manager of CS Data Managers. In 2005, Mr. Sorrell and his company received payments from the Russ Carnahan congressional committee and the Missouri Democratic Party. The third co-founder is Jean Carnahan, former Democratic United States Senator from the State of Missouri.

Obviously, given the restrictions imposed by 2 U.S.C. § 431(9)(B)(i), the Missouri Democratic Party cannot control Fired Up either directly or indirectly through the use of surrogates. Fired Up maintains that this has not occurred and represents in its Advisory Opinion Request that “Fired Up is neither owned nor controlled by any political party, political committee or candidate.” Advisory Opinion Request 2005-16 at 2

(August 22, 2005). We relied upon this representation in considering Fired Up's Advisory Opinion Request.

The facts presented in this matter also raise the concern that Fired Up may cross over into political committee status. The Act defines a "political committee" as "any committee, club, association or other group of persons" that receives contributions "or makes expenditures aggregating in excess of \$1,000 a calendar year."¹⁴ The terms "contribution" and "expenditure" are defined to reach funds given or paid "for the purpose of influencing any election for Federal office."¹⁵ On its face, this term "political committee" would even reach a law firm that makes a single \$2,000 contribution to a federal candidate. In construing the statutory definition of "political committee," however, the Supreme Court has held the term only includes an organization "under the control of a candidate or the major purpose of which is the nomination or election of a candidate."¹⁶ Later, in *FEC v. MCFL*, the Court affirmed this limiting construction of the term "political committee" when it clarified that "should MCFL's independent spending become so extensive that the organization's major purpose may be regarded as *campaign activity*, the [organization] would be classified as a political committee. . . .As such, it would automatically be subject to the obligations and restrictions applicable to those groups whose primary objective is to *influence political campaigns*."¹⁷ Thus, only when an organization has received more than \$1,000 in contributions or made more than \$1,000 in expenditures *and* has met the major purpose test, does it become a political committee pursuant to 2 U.S.C. § 431.¹⁸

In its request to the Commission, Fired Up indicated that it "intends to endorse, expressly advocate, and urge readers to donate funds to the election of *Democratic* candidates for federal, state, and local office." Advisory Opinion Request 2005-16 at 2 (August 22, 2005)(emphasis added). Moreover, the request states that its web site "contains links to *Democratic* and progressive organizations." *Id.* (emphasis added). The request indicates that Fired Up "intends aggressively to support progressive candidates and causes at all levels." *Id.* at 7. Indeed, the launch of Fired Up and its role in Democratic politics has been described this way:

[Jean] Carnahan is returning to politics—not on the ballot but on the Internet. She and longtime Democratic operative Roy Temple have launched a new Web initiative called www.firedupmissouri.com.

¹⁴ 2 U.S.C. § 431(4).

¹⁵ 2 U.S.C. §§ 431(8)(A), (9)(A). The term "contribution" is defined to include "any gift, subscription, loan, advance, or deposit of money or anything of value made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(8)(A)(i). The term "expenditure" is defined to include "any purchase, payment, distribution, loan, advance, deposit, or gift of money or anything of value, made by any person for the purpose of influencing any election for Federal office." 2 U.S.C. § 431(9)(A)(i).

¹⁶ *Buckley v. Valeo*, 424 U.S. 1, 79 (1976)(*"Buckley"*).

¹⁷ 479 U.S. at 262 (emphasis added).

¹⁸ Based upon *Buckley* and *FEC v. MCFL*, the Commission has stated that "[w]hen determining if an entity should be treated as a political committee, . . . the standard used is whether an organization's major purpose is campaign activity; that is, making payments or donations to influence any election to public office." Advisory Opinion 1996-13, Fed. Elec. Camp. Fin. Guide (CCH) ¶ 6199 (emphasis added).

Carnahan said the site would include an interactive blog of *Democratic* commentary (former Sen. Thomas F. Eagleton is among the first featured pundits). *The site is also seeking to sign up 10,000 Democratic loyalists who are “fired up and fighting back,” she added.*

St. Louis Post-Dispatch (March 7, 2005)(emphasis added). At this point, though, we can see no indication from Fired Up’s activities that its major purpose has been other than to conduct the dissemination of news and commentary over the Internet.

Qualification for the press exception is a fact specific determination. As the Supreme Court has warned, the press exemption must be narrowly construed. To do otherwise would threaten to “eviscerate” the Act. *FEC v. MCFL*, 479 U.S. at 251. Without specific facts, we do not believe it is appropriate to give some sort of blanket press exception to any entity that sets up a website. Based upon the present facts before us here,¹⁹ however, we conclude that Fired Up is a press entity and is not controlled by a political party or a candidate and is not a “political committee” under the Act. Accordingly, we voted to approve Advisory Opinion 2005-16.

11/29/05

/ s /

Date

Scott E. Thomas
Chairman

11/29/05

/ s /

Date

Danny Lee McDonald
Commissioner

¹⁹ Significantly, Advisory Opinion 2005-16 expressly limits its reach: “You do not ask, and the Commission does not address, whether any other activities Fired Up may wish to conduct, whether on the Internet or not, would be within the scope of Fired Up’s press function.” Advisory Opinion 2005-16 at 6 n.12.